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**IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM**

LEODEGARIO M. CAPULONG,

Plaintiff,

vs.

DEPARTMENT OF EDUCATION OF  
GUAM,

Defendant.

CIVIL CASE NO. 10-00005

DEFENDANT'S MOTION TO DISMISS  
UNDER FRCP 12(b)(1), 12(b)(2),  
12(b)(4)- 12(b)(6), 12(h)(3) and 41(b);  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS

ORAL ARGUMENT NOT REQUESTED

**MOTION**

Defendant, DEPARTMENT OF EDUCATION OF GUAM, ("DOE"), by counsel, moves and respectfully requests an order from this Court pursuant to Rule 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(6), 12 (h)(3) and Rule 41(b) of the Federal Rules of Civil Procedure for dismissal of this action, with prejudice, for lack of subject matter jurisdiction, lack of personal jurisdiction over the Defendant, insufficiency of process and service of process, Plaintiff's failure to state a claim upon which relief can be granted, and Plaintiff's failure to

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Motion to Dismiss and Memorandum

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1 abide by the federal and local rules of procedure and practice. This Court does not have  
2 subject matter or personal jurisdiction over DOE. Moreover, the Government of Guam's  
3 sovereign immunity (extended to its agencies) bars this action in the District Court of Guam  
4 by an individual.

5 **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

6 Plaintiff filed a Complaint on March 30, 2010, against DOE for violation of Title VII,  
7 the Americans with Disabilities Act, The Genetic Nondiscrimination Act, and the Age  
8 Discrimination in Employment Act. DOE is a line agency of the Government of Guam.  
9 Defendant did not sue the Government of Guam. Moreover, the Complaint was not received  
10 by the Attorney General's Office until July 7, 2010.

11  
12 Plaintiff's Complaint does not state sufficient factual allegations to even warrant  
13 notice pleading as is required. There is no appropriate jurisdictional statement as is required  
14 under the local rules. Moreover, Plaintiff simply makes the following statement in support of  
15 his complaint for allegedly the four causes of action stated in his caption:

16 "Unlawfully terminated after One month of teaching. Harassment,  
17 Accusation based on lies, Unlawful determination, Humiliation in front of  
18 students, Ineffective decisions, Violation of the Certification Office, Guam  
DOE assigning me to a subject that I am not certified. "

19 Plaintiff's pleading is merely conclusory without any supporting factual allegations.  
20 The complaint is vague as to dates and places worked. Plaintiff has worked for DOE on  
21 several occasions. Plaintiff was a probationary teacher at the time of his most recent  
22 termination. Plaintiff's complaint does not set forth the causal elements for any cause of  
23 action indicated in his caption.

1 Plaintiff's Complaint does not establish that this Court has subject-matter jurisdiction.  
2 Defendant contends the District Court does not have subject-matter jurisdiction over  
3 Plaintiff's claim for wrongful termination and that the action must be dismissed with  
4 prejudice. Additionally, Defendant is not a proper party and cannot be sued in the District  
5 Court of Guam due to its sovereign immunity. Neither DOE nor the Government of Guam  
6 has waived sovereign immunity so as to allow Plaintiff to bring this tort action in the District  
7 Court of Guam.

8 **A. Lack of Subject Matter Jurisdiction under FRCP 12(b)(1) and 12(h)(3)**

9 **1. No Proper Assertion of Subject-Matter Jurisdiction by Plaintiff**

10 Under Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(1), a party may assert a  
11 defense for lack of subject-matter jurisdiction by motion or in a responsive pleading. Under  
12 FRCP 12(h)(3), "If the court determines that it lacks subject-matter jurisdiction, the court  
13 must dismiss the action." Additionally, under Local Rule 10.1(a), "each complaint . . . shall  
14 state in a separate paragraph entitled "jurisdiction" the statutory or other basis for jurisdiction  
15 and the facts supporting jurisdiction . . . ." Finally, FRCP 8(a), states that "[a] pleading  
16 which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the  
17 grounds upon which the court's jurisdiction depends . . . ."

18 Plaintiff's jurisdictional paragraph in his Complaint fails to state a valid jurisdictional  
19 basis on which this Court can proceed. Plaintiff asserts several claims only in the caption of  
20 his Complaint, but fails to allege a sufficient jurisdictional or factual basis to support his  
21 filing the lawsuit in federal court.

22 Plaintiff's Complaint does not allege sufficient facts showing that he was unlawfully  
23 terminated in violation of any federal law. Plaintiff has not alleged specific factual  
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1 allegations supporting a legitimate and redressable claim for relief for wrongful termination  
2 and/or retaliation under any federal law. Defendant requests that this Court find it does not  
3 have original jurisdiction over this action and thus cannot exercise supplemental jurisdiction  
4 over the potential state law claim for wrongful termination.

5       2.       **Sovereign Immunity and Defendant's status as a line agency**

6           a.       DOE is a line agency and Not a Proper Party

7       DOE is not a proper party to this action, because the Guam legislature has not given  
8 DOE the authority to sue or be sued. DOE is not an autonomous agency. A line agency of  
9 the government cannot generally be sued. Actmedia, Inc. v. Stroh, 830 F.2d 957, 963 (9<sup>th</sup>  
10 Cir. 1986)(Plaintiff's claims against a state agency were jurisdictionally barred by the  
11 Eleventh Amendment, because there was no authorization or consent for such state agency to  
12 be sued in federal court); Wood v. Guam Power Authority, 2000 Guam 18 (2000); Singer v.  
13 Schweiker, 694 F.2d 616, 617 (9<sup>th</sup> Cir. 1982).

14           b.       The Government of Guam Has Not Waived Sovereign Immunity

15       In the present case, Plaintiff has not named the Government of Guam as a Defendant,  
16 but even if he had done so, the Government of Guam's sovereign immunity would be a  
17 jurisdictional bar to this suit. Absent a specific waiver of Guam's sovereign immunity, the  
18 District Court does not have jurisdiction over tort claims by private citizens against the  
19 Government of Guam (or by extension, a line agency of the Government of Guam). DOE has  
20 not waived sovereign immunity.  
21

22       The Government of Guam was established by the Organic Act of Guam. Under the  
23 Organic Act, the Government of Guam has the power to sue in its own name and "with the  
24 consent of the legislature evidenced by enacted law, may be sued upon . . . any tort  
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1 committed incidental to, the exercise by the government of Guam of any of its lawful  
2 powers.” 48 U.S.C. § 1421(a)(1987). The Government of Guam’s sovereign immunity may  
3 be waived, then, only by statute enacted by the Legislature.

4 As a sovereign government, the Government of Guam has inherent sovereign  
5 immunity. Marx v. Government of Guam, 866 F.2d 294, 298, 301 (9<sup>th</sup> Cir. 1989)(Guam’s  
6 inherent sovereign immunity protects it, as a sovereign, from suit without its consent.); see  
7 also Crain v. Government of Guam, 195 F.2d 414, 416 (9<sup>th</sup> Cir. 1952). The authority and  
8 power to waive the immunity to suit of the government of Guam, or any of its authorities,  
9 departments, agencies, or instrumentalities is vested solely in the Guam Legislature. 1 G.C.A.  
10 § 405; Marx, at 298; Wood v. Guam Power Authority, 2000 Guam 18 (2000).

12 Guam’s sovereign immunity is based on the same principles that underlie the  
13 Eleventh Amendment, which acts as a jurisdictional bar to any lawsuit by a private citizen  
14 against a state government in federal court, unless there has been a specific waiver of such  
15 immunity. Lawson v. Bouck, 747 F. Supp. 376, 378 (Mich. 1990). Sovereign immunity, like  
16 that of the Eleventh Amendment, is an explicit limitation on federal jurisdiction that prevents  
17 even private citizens of a state from suing a state in federal court. Pennhurst State School &  
18 Hospital v. Halderman, 104 S.Ct. 900 (1984).

19 There are instances where a state may waive its immunity but only if the state offers  
20 an “unequivocal indication” that it consents to suit in federal court. Charley’s Taxi Radio  
21 Dispatch v. SIDA of Hawaii, 810 F.2d 869, 873 (9<sup>th</sup> Cir. 1987). Such an intention may be  
22 found where (1) the state has expressly consented to federal jurisdiction in the context of the  
23 litigation; (2) a state statute or constitution provision expressly provides for suit in federal  
24 court; or (3) Congress clearly intends to condition the state’s participation in a program or  
25

1 activity on the state's waiver of immunity. Id. None of the above applies in this case.  
2 Moreover, a waiver of sovereign immunity must be expressed and cannot be implied. To  
3 constitute an express waiver, the statute at issue must specify the state's intention to be sued  
4 in federal court. Holloman v. Wall, 708 F.2d 1399, 1401-02 (9<sup>th</sup> Cir. 1983).

5 Defendant has not consented to this suit in federal court and neither Congress nor the  
6 Guam Legislature has waived the Government of Guam's sovereign immunity for tort  
7 actions brought by private citizens of Guam in the District Court of Guam. Even if Plaintiff  
8 had claimed that Defendant had somehow waived the Government of Guam's sovereign  
9 immunity, such claims of waiver are narrowly construed. Atascadero State Hosp. v. Scanlon,  
10 473 U.S. 234, 241 (1984).  
11

12 An example of the Guam Legislature's waiver of sovereign immunity is found in the  
13 Government Claims Act. 5 G.C.A. § 6101, et. seq. The government Claims Act provides a  
14 waiver of sovereign immunity for tort actions, based on negligence, brought in the Superior  
15 Court of Guam. 5 G.C.A. §§ 6105, 6208. Guam has consented only to tort actions being  
16 brought in the Superior Court based on the Government Claims Act. This waiver of  
17 immunity in state court does not constitute a waiver of its sovereign immunity so as to allow  
18 tort actions by private persons against the Government of Guam in federal court.  
19

20 Absent a specific waiver of Guam's sovereign immunity to allow suit in federal court,  
21 the District Court does not have jurisdiction over tort claims by private citizens against the  
22 Government of Guam. Because Plaintiff has not pled a basis for this Court's subject-matter  
23 jurisdiction, and because subject-matter jurisdiction cannot be waived by the Court or a  
24 party, Defendant respectfully requests that Plaintiff's Complaint be dismissed with prejudice.  
25

1           **B.       Lack of Personal Jurisdiction under FRCP 12(b)(2)**

2           Plaintiff has not named an appropriate party to sue in federal court, since he has  
3 named a state government line agency as the sole Defendant in this case. Such line agency is  
4 incapable of being sued as a Defendant under FRCP 9. Additionally, Plaintiff has not  
5 complied with FRCP 4(k)(1) or (2) to establish personal jurisdiction over Defendant, because  
6 Defendant is not a “person” capable of being sued in federal court.

7           **C.       Insufficiency of Process under FRCP 12(b)(4)**

8           DOE is not a properly named party to this action and cannot be sued in federal court.  
9  
10 Process served on Defendant in this case is thus insufficient under the rules.

11           **D.       Failure to State a Claim for Relief under FRCP 12(b)(6)**

12           Under FRCP 8(a), “A pleading which sets forth a claim for relief . . . shall contain . . .  
13 (2) a short and plain statement showing that the pleader is entitled to relief . . . .” Plaintiff  
14 has failed to show he is entitled to relief for his claim of wrongful termination against DOE.

15           Under FRCP 12(b)(6), a party may assert by motion a defense that a party has failed  
16 to state a claim upon which relief can be granted. A motion to dismiss for failure to state a  
17 claim for which relief must be granted when the complaint fails to state (1) a cognizable legal  
18 theory; or (2) sufficient facts to support a cognizable legal theory. Robertson v. Dean Witter  
19 Reynolds, Inc., 749 F.2d 530, 533 (9<sup>th</sup> Cir. 1988); First Hawaiian Bank v. Manley, 2007  
20 Guam 2 (2007). In analyzing such a motion, the court must accept all facts stated in the  
21 complaint as true. Robertson v. Dean Witter Reynolds, Inc., supra; First Hawaiian Bank v.  
22 Manley, supra.

23  
24           In this case, there is no legally cognizable theory under which Defendant, even if it  
25 was a proper party before this Court, could be held liable, in federal court, for the alleged

1 unlawful termination of Plaintiff. Plaintiff has not generally or specifically pled any of the  
2 required legal elements, nor any supporting factual allegations, to support any of the four  
3 causes of action stated in the caption of his Complaint. Rather, he just makes conclusory  
4 allegations as to his unlawful termination.

5 Plaintiff filed a Charge of Discrimination on May 23, 2009, for retaliation under Title  
6 VII of the Civil Rights Act of 1964, as amended, but not for discrimination or any of the  
7 other causes of action. [EEOC charge No. 486-2009-00344, Plaintiff's Complaint, p. 29].  
8 Plaintiff did not check the boxes for age and disability discrimination, in addition to any  
9 other alleged bases for discrimination. The EEOC issued him a right to sue letter on or about  
10 December 31, 2009, for his retaliation claim. [Plaintiff's Complaint, p. 15]. Plaintiff's  
11 Complaint, however, does not reference this charge nor does it provide any factual  
12 allegations or the required legal elements to support a claim for retaliation.  
13

14 To assert a claim for relief for retaliation under Title VII, Plaintiff must allege that:  
15 (1) he opposed an unlawful employment practice; (2) he suffered an adverse employment  
16 action; and (3) adverse employment action was caused by his opposition to the unlawful  
17 employment practice. David v. Caterpillar, Inc., 324 F.3d 851 (7<sup>th</sup> Cir. 2003).

18 There is no basis for a federal law claim for relief for retaliation, because Plaintiff has  
19 not pled any elements to show that he opposed an unlawful employment practice and that he  
20 was terminated as a result of his opposition to such employment practice. Plaintiff's prior  
21 EEOC charge was settled informally between the parties after he was terminated. Pursuant  
22 to that settlement agreement, attached to Plaintiff's Complaint as pages 25-27, GPSS agreed  
23 to give meaningful consideration to Plaintiff's employment application and encouraged him  
24 to re-apply. This agreement was signed on January 29, 2008. Plaintiff was hired as a teacher  
25



1 at Untalan Middle School in October 2008. He was terminated on January 23, 2009.  
2 Plaintiff was not retaliated against for the filing of his prior charge. Rather, Plaintiff was re-  
3 hired.

4 Under Board of Regents v. Roth, 408 U.S. 564, 569 (1972), a plaintiff “must have  
5 more than an abstract need or desire for [a thing] . . . [and] more than a unilateral expectation  
6 of it.” Roth, at 577. A plaintiff must have a legitimate claim of entitlement to it. Id. Even at  
7 the Rule 12(b)(6) stage, where notice pleading governs, courts are not obliged to credit “bald  
8 assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.” Behavioral  
9 Health Care Partners, Inc. v. Gonzales-Rivera, 392 F. Supp. 2d 191, 198 (2005); Aulson v.  
10 Blanchard, 83 F.3d 1, 3(1<sup>st</sup> Cir. 1996).

12 Plaintiff failed to exhaust his administrative remedies prior to filing this lawsuit in  
13 federal court for any alleged Americans with Disabilities Act claim or the Age  
14 Discrimination in Employment Act. He simply puts those causes of action in his caption, but  
15 fails to provide the necessary factual information sufficient to support any such causes of  
16 action. His pleading does not constitute the necessary notice pleading, and is defective.  
17 However, since he failed to exhaust his administrative remedies as to these causes of action,  
18 these claims must be dismissed. Plaintiff has not properly pled any such causes of action,  
19 and he is barred by the statute of limitations from doing so at this time. As for any alleged  
20 claim under the Genetic Information Discrimination Act, that Act was not even effective at  
21 the time of Plaintiff’s termination. It did not become effective against employers until  
22 November 21, 2009.

24 Plaintiff was a probationary employee who could be terminated at will, for any reason  
25 or no reason. Good cause is not required to terminate probationary government employees.

1 Plaintiff has not contested the fact that he was a probationary employee when he was  
2 terminated. The documents attached to Plaintiff's Complaint indicate he was terminated  
3 while he was a probationary employee. [Plaintiff's Complaint, Page 8].

4 Despite the allowance of notice pleading, Plaintiff's complaint is so vague that it does  
5 not give Defendant fair notice as to his claims. The court should not second guess the  
6 litigants "and grant them relief they did not request, pursuant to legal theories they did not  
7 outline, based on facts they did not relate." Adler v. Duval County Sch. Bd., 112 F.3d 1475,  
8 1481 n.2 (11<sup>th</sup> Cir. 1997). See also Whitney v. New Mexico 113 F.3d 1170, 1173-4 (10<sup>th</sup> Cir.  
9 1997) (Even when a Plaintiff is appearing pro se, the court cannot "supply additional factual  
10 allegations to round out a plaintiff's complaint or construct a legal theory on the plaintiff's  
11 behalf.").

12  
13 **E. Involuntary Dismissal Under FRCP Rule 41(b)**

14 Defendant respectfully requests that this Court dismiss Plaintiff's action under FRCP  
15 41(b) due to Plaintiff's failure to comply with the Federal Rules of Civil Procedure and Local  
16 Rule 10.1. Plaintiff has not stated a valid jurisdictional basis, and factual allegations to  
17 support such request for jurisdiction, has not stated valid claims for relief, nor has Plaintiff  
18 sued an appropriate entity in federal court.

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Respectfully submitted this 26th day of July, 2010.

By:

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